

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT DELAWARE**

KEURIG, INCORPORATED,

Plaintiff,

v.

KRAFT FOODS GLOBAL, INC.,
TASSIMO CORPORATION, and
KRAFT FOODS INC.,

Defendants.

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C.A. No. 07-17 (GMS)

JURY TRIAL DEMANDED

PUBLIC VERSION

**DEFENDANTS' MOTION IN LIMINE TO PRECLUDE
EXPERT TESTIMONY OF TED LINGLE**

OF COUNSEL

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Dated: August 4, 2008
Public Version Dated: August 11, 2008
877075 / 31118

*Attorneys for Defendants
Kraft Foods Global, Inc., Tassimo
Corporation, and Kraft Foods Inc.*

Defendants Kraft Foods Global, Inc., Tassimo Corporation, and Kraft Foods Inc. (collectively “Kraft”), by counsel, state the following in support of its Motion *in Limine* to preclude Ted Lingle from testifying as an expert witness at trial.¹ In particular, Kraft respectfully moves to preclude Mr. Lingle’s testimony because: (1) it is an improper attempt to usurp the Court’s role with regard to claim construction; (2) it would not assist the jury as required by Rule 702; and (3) Mr. Lingle is not even one of ordinary skill in the relevant art of the patent-in-suit, let alone an expert in that art.

ARGUMENT

I. Lingle’s Report is an Improper Attempt to Provide Claim Construction

The patent-in-suit, U.S. Patent No. 6,607,762 (“the ‘762 Patent”), claims the structure of a single serve beverage filter cartridge. Mr. Lingle does not purport to be one of ordinary skill in this art. Rather, he purports to be an expert in coffee brewing. Plaintiff Keurig, Incorporated (“Keurig”) seeks to have Mr. Lingle testify as to the meaning of the term “beverage” as used in the asserted claims in the patent-in-suit and to establish the subjective criteria for determining whether a drink is a beverage. Based upon that meaning and subjective criteria, Keurig intends to have Mr. Lingle and its technical expert, Dr. Slocum, testify that the prior art Kraft is relying upon to invalidate the patent-in-suit did not make a “beverage.” [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹ Pursuant to D. Del. LR 7.1.1, the parties met and conferred, and Plaintiff will oppose the motion.

He acknowledges, however, that under his specialized definition,² one of ordinary skill in the art could not ascertain what a “beverage” is but [REDACTED]

[REDACTED]

[REDACTED]

Moreover, when asked whether the term “beverage” has a meaning in the ‘762 Patent that is different from its plain and ordinary meaning, Mr. Lingle replied: “I believe it does.” *Id.* at 64. Applying his definition of “beverage,” a term for which Keurig did not seek claim construction, Mr. Lingle contends that, according to his well-trained palate and sense of smell, beverages brewed from the Kenco Singles™ (“Singles”) cartridges [REDACTED]

[REDACTED]

The time for construing the terms of the patent-in-suit is long passed. The parties agreed to special procedures in the Scheduling Order by which the Court would construe any disputed claim terms. *See* Scheduling Order (D.I. 34). First, to determine which claim terms may be disputed, the parties exchanged infringement and validity contentions, as well as responses thereto. Kraft identified the prior art it was relying upon, which it has consistently relied upon throughout this litigation and intends to rely upon at trial. Kraft’s Joint Invalidity Contentions (Ex. 4) at 1-2. Keurig responded by asserting what was absent from that prior art, and there was no statement that the identified prior art did not make a “beverage.” Keurig’s Response to Kraft’s Joint Invalidity Contentions (Ex. 5). Based upon the exchange of infringement and invalidity contentions, the parties subsequently exchanged lists of disputed terms requiring construction by this Court. Keurig asked the court to construe “pierced to accommodate an

² Dr. Alexander Slocum, Keurig’s technical expert, understands that Mr. Lingle presents a specialized definition of “beverage” and testified in deposition that he relied on that definition rather than the plain and ordinary meaning of the term. Slocum Dep. Tr. (Ex. 3) at 8.

inflow” and “piercable to accommodate an outflow.” September 18, 2007 Letter from G. Hrycyszyn to D. Schlitz (Ex. 6). But Keurig did not contend that the term “beverage,” standing alone or in the context of any claim element, needed construing.

The parties also did extensive briefing of the disputed claim terms. In its briefs, Keurig urged the Court to adopt its construction of the claim element “piercable to accommodate an outflow of beverage.” Keurig’s Opening Br. (Ex. 7) at 10-11. But Keurig argued that this element should construed to mean “designed to be pierced to form an outlet that allows an outflow of beverage without leakage.” *Id.* at 10. It never stated that the term “beverage” needed to be construed and never proposed a definition for the term “beverage.” Keurig did not propose criteria to determine if a drink is a beverage. And it did not offer the expert testimony of Mr. Lingle in this regard. At the *Markman* hearing, the meaning of “beverage” was not discussed. And of course, this Court has not construed the term “beverage.”

Keurig cannot now rely upon “expert” testimony at trial in lieu of having requested and obtained a claim construction from this Court. It is axiomatic that claim construction is a question of law and is within the sole province of the Court. Keurig is attempting to usurp this Court’s role and authority by having an expert witness dictate to the jury what a claim term means and the criteria for satisfying that claim term.

Having failed to make the term “beverage” a claim construction issue, Keurig cannot now contend that expert testimony is now needed to assist the jury in understanding the meaning of “beverage” and to set the criteria for determining whether a drink is a “beverage.” Since Keurig did not seek a claim construction of “beverage” during the claim construction process, the term must be given its plain and ordinary meaning. There is no need for an expert to assist the jury in understanding the plain and ordinary meaning of a term. And it is not appropriate to have a

purported coffee brewing expert testify that in his judgment a drink does not meet his subjective criteria as to acceptable taste, odor, color, or strength to qualify as a cup of coffee. Mr. Lingle contends that a person of ordinary skill in the art could not even ascertain what a “beverage” is without consulting an expert. Lingle Dep. Tr. (Ex. 2) at 75-76. Of course, this renders the claims indefinite.³ See 35 U.S.C § 112.

II. Lingle’s Testimony Would Not Assist the Trier of Fact

Under Rule 702, expert testimony must “assist the trier of fact to understand the evidence or to determine a fact in issue.” *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, (1993) (quoting Fed. R. Evid. 702). Mr. Lingle’s testimony is not intended to assist the jury in understanding the evidence and making a factual determination. Rather, it is intended to set criteria for a beverage that are not in the patent-in-suit and then tell the jury that in his judgment the drink produced by the Singles cartridge does not have the flavor, color, odor or strength to qualify as a cup of coffee.

III. Lingle is Not an Expert in the Relevant Art of the ‘762 Patent

Rule 702 also requires that a technical expert in a suit for patent infringement have specialized knowledge in the relevant art of the patent-in-suit. See *Elcock v. Kmart Corp.*, 233 F.3d 734, 741 (3d Cir. 2000); *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 743 (3d Cir. 1994) (must be connection between expert testimony and factual issues in the case). But Mr. Lingle lacks expertise in brewer or beverage cartridge design, or even fluid mechanics. Lingle Dep. Tr. (Ex. 2) at 18, 93-94. In short, Mr. Lingle is not an expert in the single-serve beverage filter cartridge art – the relevant art of the ‘762 Patent. Rather, he is an expert in “[c]offee,

³ Mr. Lingle’s proposed definition of “beverage” runs contrary to the maxim that claims should be construed to preserve validity. See *Lucent Technologies, Inc. v. Gateway, Inc.*, 525 F.3d 1200, 1215 (Fed. Cir. 2008).

coffee brewing, coffee tasting.” *Id.* at 5. Keurig’s other technical expert, Dr. Alexander Slocum, asserts that “a person of ordinary skill in the relevant art would include a *skilled mechanical or materials engineer*.” Slocum Dep. Tr. (Ex. 3) at 168 (emphasis added). Mr. Lingle studied civil engineering and he has never been a practicing engineer. Lingle Dep. Tr. (Ex. 2) at 5-6. Thus, not only is Mr. Lingle not an expert, he is not even a person of ordinary skill in the art. Accordingly, Mr. Lingle is not qualified as an expert to give opinions with respect to issues of infringement and validity with regard to the ‘762 Patent. Thus, the Court must preclude his testimony on those issues, as well as preclude Keurig’s technical expert, Dr. Alexander Slocum, from relying on the subject matter disclosed in Mr. Lingle’s expert reports.

CONCLUSION

For the foregoing reasons, Kraft respectfully requests that the Court grant this Motion *in Limine* to testimony at trial.

Respectfully submitted,

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Dated: August 4, 2008
877075 / 31118

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Kraft Foods Global, Inc., Tassimo
Corporation, and Kraft Foods Inc.*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

CERTIFICATE OF SERVICE

I, David E. Moore, hereby certify that on August 11, 2008, the attached document was electronically filed with the Clerk of the Court using CM/ECF which will send notification to the registered attorney(s) of record that the document has been filed and is available for viewing and downloading.

I further certify that on August 11, 2008, the attached document was Electronically Mailed to the following person(s):

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EXHIBIT 1

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**

EXHIBIT 2

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF DELAWARE

-----X

3 KEURIG, INCORPORATED,
4 Plaintiff,
5 VS
6 KRAFT FOODS GLOBAL, INC., TASSIMO
CORPORATION, and KRAFT FOODS, INC.,
7
8 Defendants.

Civil Action No. 07-CV-0017-GMS

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10
11
12 VIDEOTAPED DEPOSITION OF TED R. LINGLE

13 Friday, June 27, 2008

14 9:11 a.m. - 2:05 p.m.

15 WOLF, GREENFIELD & SACKS, P.C.

16 600 Atlantic Avenue

17 Boston, Massachusetts 02210

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19 Court Reporter: Loretta Hennessey, RDR, CRR
20
21
22

23 ELLEN GRAUER COURT REPORTING CO. LLC

126 East 56th Street, Fifth Floor

24 New York, New York 10022

212-750-6434

25 REF: 87840

1 LINGLE

2 please swear in the witness.

3 TED R. LINGLE, Sworn

4 having been satisfactorily

5 identified by production of his California driver's

6 license and duly sworn, was examined and testified

7 as follows:

8 DIRECT EXAMINATION

9 BY MR. SCHLITZ:

10 Q. Mr. Lingle, what is your area of
11 expertise?

12 A. Coffee, coffee brewing, coffee tasting.

13 Q. Now, you graduated from the United States
14 Military Academy; is that correct?

15 A. That's correct.

16 Q. In what year?

17 A. 1966.

18 Q. Okay. And you got a degree in civil
19 engineering; is that correct?

20 A. That's correct.

21 Q. What does civil engineering cover?

22 A. Civil engineering was sort of a catch-all
23 degree for a heavily science-based education that
24 was somewhat unique to the Military Academy at the
25 time. There were no majors. All the cadets were

1 LINGLE

2 required to take a fairly prescribed set of courses.
3 To give you an example, in the four years that I was
4 there, I had an opportunity to take three electives.

5 Q. Okay. Now, when you -- after you
6 graduated -- did you graduate from the Military
7 Academy?

8 A. Yes, I did.

9 Q. Okay. Did you then go into the Army?

10 A. Yes, I served four years on active duty.

11 Q. Okay. And what jobs did you have on
12 active duty?

13 A. I was a Second Lieutenant. I had an
14 opportunity to command a platoon and an opportunity
15 to command an armored recon troop in Germany, and
16 then I spent a year in Vietnam as an advisor to a
17 Vietnamese reserve military unit.

18 Q. So you didn't practice as a civil
19 engineer, did you?

20 A. No, I did not.

21 Q. Okay. And then when you left the Army --
22 how many years did you spend in the Army?

23 A. I was in the Army for four years.

24 Q. When you left the Army, what did you do,
25 what -- next job?

1 LINGLE

2 Q. And what is the Coffee Quality Institute?

3 A. It's actually a non-profit 501(c)(3) trust
4 that SCAA started in 1996, and its purpose is to
5 work internationally, meaning working with
6 coffee-producing countries, to improve the quality
7 of coffee and the lives of the people who produce
8 it.

9 Q. Okay. It has nothing to do with designing
10 single-serve beverage cartridges, does it?

11 A. No, it does not.

12 Q. It has nothing to do with designing
13 brewers, does it?

14 A. No, it does not.

15 Q. And in your work here today as an expert
16 witness, were you -- is the Wolf Greenfield firm
17 paying you personally or are they paying the
18 organization?

19 A. They're paying the organization.

20 Q. And is that going to jeopardize their
21 non-tax status?

22 A. No.

23 Q. Well, how is this a, is your work in this
24 case part of the mission of a non-tax organization?

25 A. It involves the, sort of the public

1 LINGLE

2 A. If -- it could be if the other components
3 were there, the aroma, taste, and body.

4 Q. Well, how would one reading this patent in
5 suit -- you've read the patent, haven't you?

6 A. Yes, I have.

7 Q. Okay. Now, you're an expert on coffee,
8 but how would one of ordinary skill in the art with
9 regard to the art of single-serve beverage
10 cartridge, how would that person know if it is a
11 coffee beverage?

12 A. I'm not quite sure I understand your
13 question. Could you repeat it?

14 Q. You're one who's an expert, you told me,
15 in coffee, right?

16 A. Yes, that's correct.

17 Q. Now, the -- one of ordinary skill in the
18 art in building and constructing single-serve
19 coffee, excuse me, single-serve beverage cartridges
20 is not one who's an expert in coffee, you'd agree
21 with that?

22 A. I'd agree with that.

23 Q. Okay. And how would that person know if
24 the, if the beverage that extracts, that exited a
25 cartridge was a coffee beverage?

1 LINGLE

2 A. Well, I'm sure that that engineer would
3 hire someone like me who is a coffee expert and can
4 advise them on what the parameters are that they're
5 shooting for in terms of creating a coffee beverage
6 with the right level of color, body and flavor.

7 Q. All right. So it would require hiring an
8 expert like you?

9 A. Yes, it would require someone who
10 understands the coffee beverage.

11 Q. Okay. Now, there are not many of you in
12 the world, so if a, if a, an engineer of ordinary
13 skill in the art wanted to use TDS as a measure,
14 would that be an acceptable measure?

15 A. That's an acceptable metric for measuring
16 on a scientific basis the extract that you've
17 created in that beverage cartridge.

18 But I would disagree with the premise that there
19 aren't many people like me in the world. I'm sure
20 there are many coffee experts at a company like
21 Kraft. I mean, I've met a few of them. They're
22 very fine coffee people.

23 Q. Absolutely. And maybe you'll meet some
24 more at the trial.

25 But if someone's not at a major company like Kraft,

1 LINGLE

2 application, it means one that the average person
3 would go out on a commercial level and purchase
4 either for home use or for consumption away from
5 home.

6 Q. Okay. My question to you is, does
7 "beverage" have a meaning in the patent that is
8 different than its ordinary meaning?

9 A. I believe it does.

10 Q. Okay. What do you believe the ordinary
11 meaning of "beverage" is?

12 A. The ordinary meaning would be a product
13 that could be either sold or consumed for a person's
14 enjoyment.

15 Q. So it's --

16 A. I mean, there would be certain categories
17 I would exclude. I wouldn't include tap water in
18 the context of a beverage.

19 Q. So you think the word "beverage" has a
20 commercial, has a commercial connotation?

21 A. When I read the patent, then I was
22 assuming, my assumption is the average person
23 reading that patent would assume this was a beverage
24 for commercial application.

25 Q. Okay. And what is the basis of that

1 LINGLE

2 Q. Okay. And if they did hire someone who
3 held themselves out as having expertise in coffee
4 taste and smell --

5 A. Uh-huh.

6 Q. -- could that person say that a particular
7 strength coffee wouldn't be acceptable to anybody?

8 A. Yes, you can establish parameters that
9 would categorically exclude some fluids as being
10 acceptable when represented as a coffee beverage.

11 Q. All right. And traditionally the metric
12 for that in the industry has been TDS; is that
13 right?

14 A. Yes, that's been the most common.

15 Q. Now, what is the -- going back to your
16 statement, "That is, one does not obtain output
17 liquid of sufficient strength and with an adequate
18 flavor and aroma profile," what is the measure of
19 adequate flavor?

20 A. The flavor would be a subjective
21 measurement, so it's a person tasting the fluid
22 saying, no, this isn't right.

23 Q. Okay. But is there a metric for measuring
24 that?

25 A. Not that I know of.

1 LINGLE

2 Q. Okay. So one who is of ordinary skill in
3 the art in designing and making single-serve
4 beverage cartridges wouldn't have a metric, that
5 person would have to go to an expert in coffee; is
6 that correct?

7 A. That's correct.

8 Q. Okay. What is the measure of acceptable
9 aroma profile?

10 A. That's also subjective.

11 Q. Okay. And one of ordinary skill in the
12 art, an engineer in building, constructing
13 single-serve beverage cartridges, what would be the
14 metric that person would have to use to determine if
15 the resultant beverage satisfies the aroma profile?

16 A. That would also be subjective. They would
17 taste and smell the fluid and say, "yes, this smells
18 like coffee," or, "no, this doesn't smell like
19 coffee."

20 Q. Okay. But what I'm trying to understand
21 is what if that engineer, you know, thinks that a
22 beverage that has just barely traceable aroma is
23 acceptable. Would you accept that?

24 A. Accept it in what way?

25 Q. Well, since it's subjective, could that

1 LINGLE

2 is outside the acceptable range for consumers?

3 A. Yes, using the metric as an analogy.

4 Q. Okay. But if it were in the -- if that
5 metric were in the acceptable range for consumers,
6 would you have any reason to say that the piercing
7 into the manifold area would not produce a
8 acceptable coffee beverage?

9 A. Well, I'd still want to taste the beverage
10 so we're not using soluble solids as the only method
11 of --

12 Q. I understand that. But you explained why
13 you thought piercing directly into the coffee bed,
14 but I'm -- since -- if you use the manifold, and you
15 get this more even distribution, why would it not
16 create a coffee beverage?

17 A. If I understand your question correctly,
18 you're saying if we use the manifold with same-side
19 piercing?

20 Q. Yes.

21 A. I'm not exactly sure of the answer because
22 it has to do with the fluid dynamics of the way the
23 water would actually move through that manifold, and
24 I think that's more in the area of expertise of
25 someone who's an expert in fluid design.

1 LINGLE

2 Q. And that's not your area?

3 A. No. I understand some of fluid mechanics,
4 but that's not my area of expertise.

5 Q. Okay. And under any circumstances, you're
6 not going to agree with what I have to say.

7 Now, but you, you told me earlier that when you were
8 working for Lingle Brothers, you did, you did tell
9 customers about drip filter coffee, right?

10 A. Yes.

11 Q. Okay. So the -- I think you used the word
12 -- when you were saying why the Kenco Singles using
13 same-side piercing would not produce a particularly
14 acceptable cup of coffee, you mentioned several
15 things. You mentioned, I think, pressure; is that
16 right?

17 A. The flow rate, yes, the pressure.

18 Q. The flow rate? What is the flow rate?

19 A. That would be the rate at which the water
20 travels through the coffee bed.

21 Q. Is that speed or is that --

22 A. That's speed.

23 Q. That's speed? Okay.

24 Now, would the rate that it is, that the water is
25 introduced into the coffee bed, would that make a

EXHIBIT 3

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF DELAWARE

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3 KEURIG, INCORPORATED,
4 Plaintiff,

5 v.

6 KRAFT FOODS GLOBAL, INC., TASSIMO CORPORATION, and
7 KRAFT FOODS INC.,

Defendants.

8 Civil Action No. 07-CV-0017-GMS

9 - - - - - x

10
11
12 VIDEOTAPED DEPOSITION OF ALEXANDER H. SLOCUM

13 Wednesday, June 11, 2008

14 9:10 a.m. to 5:00 p.m.

15 WOLF, GREENFIELD & SACKS, P.C.

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19 Reporter: Marianne R. Wharram, CSR/RPR

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212-750-6434

25 REF: 87765

1 SLOCUM

2 construction, or claim construction, what different
3 terms mean. That's what I have to ultimately abide
4 by is what is the Court's claim construction.

5 Q. In your expert report, you opine about the
6 meaning of the word beverage; is that correct?

7 MR. RADER: Objection to the form. You
8 can answer.

9 A. Well, my understanding for the term
10 beverage -- because I'm not an expert in that area,
11 I relied -- the Court itself didn't give me an
12 exact definition of what beverage is. I have to
13 refer back explicitly to that document, but in that
14 respect, I relied on Mr. Lingle, who is an
15 acknowledged expert in the field of coffee
16 beverages. And then, when I actually ran the
17 various tests in various scenarios, I also, because
18 I'm a fairly avid coffee drinker, would then taste
19 the stuff made by the various ways I did.

20 Q. (BY MR. SCHLITZ) But when you read the
21 patent, what was your understanding? Before --
22 when did you speak to Mr. Lingle?

23 A. I first met Mr. Lingle a couple of months
24 ago when I did my extensive tests with the hot
25 water to actually attempt to create the beverage.

1 SLOCUM

2 opinion as to whether the patent discloses a single
3 foil?

4 A. Well, yeah, if there was a single piece of
5 foil everywhere, then that is a single piece of
6 foil.

7 Q. And are you basing your opinion on the
8 commercial product?

9 A. No. That helps. It doesn't say it has to
10 be that way.

11 Q. But how does it help?

12 A. It helps me understand how one skilled in
13 the art and practices the art --

14 Q. Okay.

15 A. -- and verifies my reading of -- of this.
16 As you said earlier, could it go that way? It
17 could.

18 Q. Now, you say in footnote four, in my
19 opinion, a person of ordinary skill in the relevant
20 art would include a skilled mechanical or materials
21 engineer, whether or not he or she had specifically
22 worked in the consumer packaging industry. Okay.
23 I take it that is your opinion today as to what one
24 of ordinary skill in the art would be?

25 A. Correct.

EXHIBIT 4

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

KEURIG, INCORPORATED,

Plaintiff,

V.

KRAFT FOODS GLOBAL, INC.,
TASSIMO CORPORATION, and
KRAFT FOODS INC.,

Defendants

C. A. No. 07-17 (GMS)

JURY TRIAL DEMANDED

**DEFENDANTS KRAFT FOODS GLOBAL, INC., TASSIMO CORPORATION, AND
KRAFT FOODS INC.'S JOINT INVALIDITY CONTENTIONS**

Pursuant to the Court's Scheduling Order of July 17, 2007, Defendants Kraft Foods Global, Inc., Tassimo Corporation, and Kraft Foods Inc. (collectively, "Kraft"), submits the following invalidity contentions for claims 1, 2, and 8-10 of U.S. Patent No. 6,607,762 ("762 Patent") asserted by Plaintiff Keurig. Kraft reserves the right to supplement these invalidity contentions, or cite additional prior art, as discovery progresses or if Plaintiff Keurig modifies its disclosure of asserted claims or infringement contentions.

Kraft provides its invalidity contentions in the claim chart below. Kraft cites three (3) pieces of prior art, and submits four (4) invalidity contentions based on the cited prior art: the Kenco Singles® capsules in public use in the United States prior to the December 1, 1999 date of invention of the '762 Patent alleged by Plaintiff Keurig, as shown in Exhibit A; U.S. Patent No. 4,853,234 ("234 Patent") to Bentley *et al.* entitled "Beverage Packages," as shown in Exhibit B; U.S. Patent No. 4,452,130 to Klein entitled "Electrical Apparatus Useful to Prepare a Hot Beverage" ("130 Patent"), as shown in Exhibit C; and as

further shown when inverted in Exhibit D; and, finally, the '130 Patent in view of its operation as disclosed.

These invalidity contentions are consistent with Keurig's infringement contentions in Keurig's Disclosure of Infringement Contentions served on July 27, 2007. As indicated in the Kraft defendants' non-infringement claim charts, the Tassimo® Discs do not infringe the '762 patent. Nevertheless, as shown by the following invalidity contentions, if claims 1, 2 and 8-10 of the '762 Patent are applied as Keurig applied these claims in its infringement claim charts, and reiterated in its counsel's letter dated August 3, 2007, then the cited prior art anticipates.

Invalidity Claim Charts

A. Kenco Singles™ Capsule

Claim Language - '762 Patent	Kenco Singles™ Capsule
Claim 1	
A beverage filter cartridge comprising:	YES. The Kenco Singles capsule is a beverage filter cartridge.
an outer container having an access opening:	YES. The Singles capsule has an outer container with an access opening.
a filter element received in and configured and arranged to subdivide the interior of said container into first and second chambers;	YES. The Kenco Singles includes a permeable filter received in and configured and arranged in the inner container such that it separates two chambers in the interior of the container so that infused beverage created in the first chamber must flow through the filter element before it can enter the second chamber.
a soluble beverage medium stored in said first chamber; and	YES. The Kenco Singles include a first chamber in which a beverage medium is stored. Beverage media suitable for use with Singles capsules include, for example, roast and ground coffee, tea, and powdered chocolate.

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

KEURIG, INCORPORATED,

Plaintiff,

v.

Civil Action No. 07-017-GMS

KRAFT FOODS GLOBAL, INC.,
TASSIMO CORPORATION, and
KRAFT FOODS INC.,

Defendants.

**PLAINTIFF'S RESPONSE TO DEFENDANTS KRAFT FOODS GLOBAL, INC.,
TASSIMO CORP., AND KRAFT FOODS INC.'S JOINT INVALIDITY CONTENTIONS**

In response to Defendants Kraft Foods Global, Inc., Tassimo Corp., and Kraft Foods Inc.'s Joint Invalidity Contentions ("Invalidity Contentions"), Plaintiff Keurig, Incorporated ("Plaintiff" or "Keurig") provides the following validity contentions for asserted claims 1, 2, 8, 9, and 10 of United States Patent No. 6,607,762 (the "'762 patent").

Plaintiff bases these validity contentions on its current knowledge, understanding and belief as to the facts and information available to it as of the date of these disclosures. This case is still in the early stages of discovery and Plaintiff has not yet completed its investigation, collection of information, discovery or analysis related to this action. Accordingly, Plaintiff reserves the right to supplement, amend or modify the information contained herein and introduce such information and any subsequently-identified documents at trial. As discovery is taken, and additional details are provided regarding the alleged prior public use or if Defendants modify their invalidity contentions, Plaintiff's validity contentions may need to be amended, supplemented and/or corrected.

I. THE '762 PATENT IS VALID IN LIGHT OF THE ALLEGED PRIOR ART IDENTIFIED BY DEFENDANTS

The alleged prior art identified in Defendants' Invalidity Contentions *inter alia* does not disclose each and every element of the claimed invention of the '762 patent. Defendants, in their Invalidity Contentions, allege that the '762 patent is invalid under four separate bases of invalidity. Defendants contend that the '762 patent is anticipated by a capsule called Kenco Singles which was allegedly in public use in the United States prior to the invention of the claimed matter of the '762 patent.¹ Defendants also identify two prior art patents that allegedly anticipate the '762 patent, including United States Patent No. 4,853,234, entitled "Beverage Packages" (the "'234 patent"), and United States Patent No. 4,452,130, entitled "Electrical Apparatus Useful to Prepare a Hot Beverage" (the "'130 patent").² Defendants also allege that the '130 patent anticipates the '762 patent in a different configuration than disclosed in the '130 patent – a configuration Defendants have dubbed "inverted."

¹ Defendants contend that the Kenco Singles capsule was in public use in the United States more than one year prior to the date of filing of the application that issued as the '762 patent. However, Defendants have provided no evidence supporting this contention and Keurig does not concede this issue.

² Defendants also included a copy of United States Patent No. 5,111,740, entitled "Electrical Apparatus Useful to Prepare a Hot Beverage" (the "'740 patent"), in the Exhibits to their Invalidity Contentions. However, Defendants' Invalidity Contentions provide no separate allegations of invalidity with respect to this patent. Defendants' Invalidity Contentions simply refer to the '740 patent in their contentions for the '130 patent. Accordingly, Keurig has not provided a detailed response as to which elements are not taught or disclosed in this patent. However, it is clear that the '740 patent does not disclose each and every element of the claimed invention of the '762 patent. Keurig reserves the right to supplement this response if Defendants supplement or otherwise amend their invalidity contentions to allege that the '740 patent invalidates the '762 patent.

A. Kenco Singles Capsules Do not Anticipate the '762 Patent

Kenco Singles capsules do not anticipate the '762 patent under 35 U.S.C. § 102 because the Kenco Singles capsules do not include each and every element of the claimed invention of the '762 patent. With respect to independent claims 1 and 10 of the '762 patent, the Kenco Singles capsules do not include a single lid that is both: (1) piercable to accommodate an inflow of liquid into a first chamber for infusion with a beverage medium to produce a beverage; and (2) piercable to accommodate an outflow of a beverage from a second chamber to the exterior of the cartridge. Claims 2, 8 and 9, which depend from claim 1, are also not anticipated by the Kenco Singles capsules for at least these same reasons. Accordingly, for at least these reasons, the Kenco Singles capsules do not anticipate the '762 patent.

B. The '234 Patent Does not Anticipate the '762 Patent

The '234 patent does not anticipate the '762 patent under 35 U.S.C. § 102 because the '234 patent does not disclose each and every element of the claimed invention of the '762 patent. With respect to independent claims 1 and 10 of the '762 patent, the '234 patent does not disclose a single lid that is both: (1) piercable to accommodate an inflow of liquid into a first chamber for infusion with a beverage medium to produce a beverage; and (2) piercable to accommodate an outflow of a beverage from a second chamber to the exterior of the cartridge. Claims 2, 8 and 9, which depend from claim 1, are also not anticipated by the '234 patent for at least these same reasons. Accordingly, for at least these reasons, the '234 patent does not anticipate the '762 patent.

C. The '130 Patent Does not Anticipate the '762 Patent

The '130 patent does not anticipate the '762 patent under 35 U.S.C. § 102 because the '130 patent does not disclose each and every element of the claimed invention of the '762 patent.

With respect to independent claims 1 and 10 of the '762 patent, the '130 patent does not disclose a single lid that is both: (1) piercable to accommodate an inflow of liquid into a first chamber for infusion with a beverage medium to produce a beverage; and (2) piercable to accommodate an outflow of a beverage from a second chamber to the exterior of the cartridge. Claims 2, 8 and 9, which depend from claim 1, are also not anticipated by the '234 patent for at least these same reasons. Accordingly, for at least these reasons, the '234 patent does not anticipate the '762 patent.

**D. The '130 Patent Does not Anticipate the
'762 Patent in an "Inverted" Configuration**

The '130 patent in an "inverted" configuration does not anticipate the '762 patent under 35 U.S.C. § 102. Defendants allege that the filter carrier unit disclosed in the '130 patent can be "inverted," *i.e.*, turned upside down, to anticipate the '762 patent. However, this "inverted" configuration is not disclosed or in any way suggested in the '130 patent. And the disclosure of the '130 patent does not enable a functioning beverage filter cartridge in the "inverted" configuration. In addition, with respect to independent claims 1 and 10 of the '762 patent, Defendants' "inverted" configuration of the '130 patent does not disclose a single lid that is both: (1) piercable to accommodate an inflow of liquid into a first chamber for infusion with a beverage medium to produce a beverage; and (2) piercable to accommodate an outflow of a beverage from a second chamber to the exterior of the cartridge. Claims 2, 8 and 9, which depend from claim 1, are also not anticipated by the '130 patent in Defendants' "inverted" configuration for at least these same reasons. Accordingly, for at least these reasons, Defendants' "inverted" configuration of the '130 patent does not anticipate the '762 patent.

II. CLAIM 10 OF THE '762 PATENT IS NOT INDEFINITE

Defendants, in their Invalidity Contentions, do not assert that any terms in the claims of the '762 patent are indefinite under 35 U.S.C. § 112(2). Indeed, Defendants, in their Invalidity Contentions, were able to identify where each of the elements of the claimed invention of the '762 patent are allegedly disclosed in the identified prior art, admitting that Defendants can (or at least claim to be able to) understand the claim language.

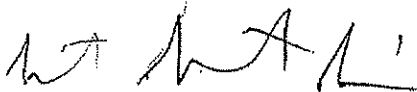
In Defendants Kraft Foods Global, Inc., Tassimo Corp., and Kraft Foods Inc.'s Joint Response to Plaintiff's Disclosures of Asserted Claims and Infringement Contentions, Defendants allege that the claim language "and the and [SIC] section of said lid being pierceable to accommodate an outflow of the beverage from said second chamber to the exterior of said cartridge" is indefinite. Defendants' suggestion that a minor typographical error evident from the face of the patent renders the patent claims indefinite is contrary to well established law.³ This claim language includes a typographical error that was introduced during printing of the patent – "and the and section" should read "and the second section." It is clear from the context of the claim language and the disclosure in the specification that the second section of the lid is being referred to. Indeed, the prosecution history confirms that "and" was supposed to be "second." This claim language is from a claim added during prosecution of the application that issued as the '762 patent.⁴ In the amendment where this language was added, the correct language ("second") appears. This amendment is part of the prosecution history and makes clear what the correct word is. Accordingly, this claim language is not insolubly ambiguous.

³ See, e.g., *Novo Indus., L.P. v. Micro Molds Corp.*, 350 F.3d 1348, 1357 (Fed. Cir. 2003) (holding that a district court can retroactively correct errors in claim language when the error is evident from the face of the patent).

⁴ See Amendment to Office Action Mailed on September 24, 2002 at 4.

Respectfully submitted,

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Dated: August 31, 2007

EXHIBIT 6



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Re: Keurig v. Kraft, et al.
Civil Action No. 07-017 GMS
Our File No.: K0502.60000US00

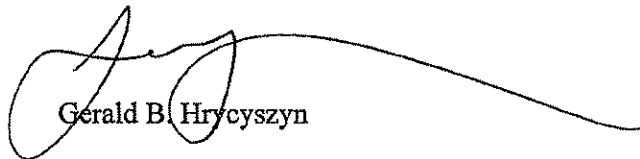
Dear David:

In accordance with our agreement regarding the claim construction schedule, Keurig provides the following notice of the claim terms that it contends require construction:

1. "first and second chambers" in claims 1 and 10 of the '762 patent;
2. "piercable to accommodate an inflow" in claims 1 and 10 of the '762 patent; and
3. "piercable to accommodate an outflow" in claims 1 and 10 of the '762 patent.

Very truly yours,

WOLF, GREENFIELD & SACKS, P.C.



Gerald B. Hrycyszyn

EXHIBIT 7

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

KEURIG, INCORPORATED,

Plaintiff,

v.

KRAFT FOODS GLOBAL, INC.,
TASSIMO CORPORATION, and
KRAFT FOODS INC.,

Defendants.

Civil Action No. 07-017-GMS

KEURIG INCORPORATED'S OPENING CLAIM CONSTRUCTION BRIEF

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Attorneys for Plaintiff Keurig, Incorporated

Dated: October 15, 2007

A. **“piercable to accommodate an inflow of liquid” and
“piercable to accommodate an outflow of beverage”**

Language from Claims 1 and 10 that Keurig Suggests Requires Construction	Keurig's Proposed Construction
piercable to accommodate an inflow of liquid	designed to be pierced to form an inlet that allows an inflow of liquid without leakage
piercable to accommodate an outflow of beverage	designed to be pierced to form an outlet that allows an outflow of beverage without leakage

The claim language “piercable to accommodate an inflow of liquid” and “piercable to accommodate an outflow of beverage” should be construed as complete phrases and in the context of the entire claim, as clarified by the specification. The adjective “piercable” cannot be taken in isolation and construed in a vacuum as Kraft urges the Court to do. This word is part of larger phrases whose meaning lies at the heart of the claimed invention of the '762 patent, which is directed to **same-side piercing** of a single-serve beverage filter cartridge lid to create “a cleaner puncture and an improved seal” that avoids leakage.

While just about anything is theoretically “piercable” if given the right tools and enough force, the patent plainly does not cover any and all lids that can somehow be pierced. Rather, it covers a cartridge with a lid that is piercable in a particular manner, namely “to accommodate an inflow” or “outflow.” What does this qualification to the word “piercable” require? As discussed below, the patent specification answers this question by clarifying that it must be designed to be pierced **so as to form** a particular type of seal onto an **inlet and outlet**, avoiding leakage.

The adjective “piercable” in claims 1 and 10 must be construed along with the claim language that it modifies, “to accommodate an inflow of liquid” and “to accommodate an outflow of beverage,” in the context of the entire claim. “Proper claim construction . . . demands interpretation of the entire claim in context, not a single element in isolation.” Pause Tech. LLC

v. TiVo Inc., 419 F.3d 1326, 1331 (Fed. Cir. 2005) (internal citations omitted). In the context of the claim language, the adjective “piercable” modifies the phrase “to accommodate,” whose plain and ordinary meaning is “to fit, adapt, or make suitable.” Webster’s New Universal Unabridged Dictionary at A52-A53; see also Oxford Dictionary of Current English at A54-A56 (accommodate – “to adapt to or fit in with”). Taken together, “piercable,” meaning “capable of being pierced,” and “to accommodate,” meaning “to fit, adapt, or make suitable,” should be read to mean adapted or made suitable to be pierced, *i.e.*, “designed to be pierced.”

Moreover, taken together with the remaining words in those phrases, “piercable to accommodate **an inflow of liquid**” and “piercable to accommodate **an outflow of beverage**,” must be read in light of the purpose of the invention, which in this case is a single-serve beverage filter cartridge that allows same-side piercing of the cartridge while minimizing leakage. “[T]he interpretation to be given a [patent claim] term can only be determined and confirmed with a full understanding of what the inventors actually invented and intended to envelop with the claim.” Phillips, 415 F.3d at 1316. It is therefore important to “consider the functions of an invention” when determining the meaning of the claim terms. Medrad, Inc. v. MRI Devices Corp., 401 F.3d 1313, 1319 (Fed. Cir. 2005). Here, the specification of the ‘762 patent emphasizes that the claimed single-serve beverage filter cartridge is designed such that the “first and second lid sections are yieldably **piercable**, respectively, **from the same direction** . . . [such that the] net result is a **cleaner puncture and an improved seal**.” (‘762 Patent at A7, col. 2, ll. 6-20 (emphasis added)). And the specification further states that the claimed invention is targeted at avoiding potential problems with the design of prior art cartridges which “can **adversely affect the puncturing process, resulting in leakage**.” (‘762 Patent at A7 at col. 1, ll. 45-50 (emphasis added)). A person of ordinary skill in the art certainly would not view a cartridge as being